81-2117

No.

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In the Supreme Court of the United States

October Term, 1981

STATE OF MISSOURI, *Petitioner,*

vs.

ANTHONY J. KANE, *Respondent.*

STATE OF MISSOURI, *Petitioner,*

vs.

RAY A. THOMPSON, *Respondent.*

STATE OF MISSOURI, *Petitioner,*

vs.

CHARLES ARNOLD, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JOHN ASHCROFT
Attorney General

PHILIP M. KOPPE, *Counsel of Record*
Assistant Attorney General
Missouri State Office Building
615 E. 13th Street, Room G-20
Kansas City, Missouri 64106
(816) 274-6773
Attorneys for Petitioner

STEVEN W. GARRETT
Assistant Attorney General
Supreme Court Building
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Of Counsel

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both armed criminal action, § 571.015, RSMo 1978, and its predicate felony, where the proof required to establish a violation of the latter is necessarily required to prove a violation of the former?

2. Whether the Missouri Supreme Court is bound by *Brintley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's decisions in the three cases joined by this petition, which reaffirm prior rulings to the effect that the conviction of a defendant in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflict with this Court's decision in *Brintley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979)?

4. Whether the Missouri Supreme Court's decisions in the three cases encompassed by this petition conflict with the rulings of this Court in *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz v. United States*, 450 U.S. ....., 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

5. Whether the decisions of the Missouri Supreme Court in the three cases joined by this petition conflict with the orders issued by this Court in *Missouri v. Counselman*, No. 80-754, ... U.S. ....., 101 S.Ct. 1690, 68 L.Ed.2d

190 (1981); *Missouri v. Brown*, No. 80-1368, ... U.S. ....., 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri v. Greer*, No. 80-997, ... U.S. ....., 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri v. Sinclair*, No. 80-1166, ... U.S. ....., 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri v. Lowery*, No. 80-1561, ... U.S. ....., 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); and *Missouri v. Crews*, No. 80-1393, ... U.S. ....., 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981)?

PARTIES

In the Missouri Supreme Court, and previously, in the Missouri Court of Appeals, Western District, the parties were as follows:

State of Missouri, respondent *v. Anthony J. Kane*, appellant, in cause No. 63,324 (No. WD 31,611 in the Court of Appeals);

State of Missouri, respondent *v. Ray A. Thompson*, appellant, in cause No. 63,325 (No. WD 31,513 in the Court of Appeals);

State of Missouri, respondent *v. Charles Arnold*, appellant, in cause No. 62,999 (No. WD 31,326 in the Court of Appeals).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgments of the Missouri Supreme Court, in the cases styled, *State of Missouri v. Anthony J. Kane,* No. 63,324; *State of Missouri v. Ray A. Thompson,* No. 63,325, and *State of Missouri v. Charles Arnold,* No. 62,999.

OPINIONS BELOW

The opinions of the Missouri Supreme Court in the three cases for which the writ of certiorari is being sought have been reprinted in Appendices A-1, B-1 and C-1. Included with them are the earlier opinions of the Missouri Court of Appeals, Western District, reprinted in Appendices A-2, B-2 and C-2. One of the opinions has been reported; the others have not. The cases are as follows:

State of Missouri v. Anthony J. Kane, No. 63,324, filed March 9, 1982 (the Missouri Supreme Court also adopted the opinion of the Missouri Court of Appeals, Western District, which was filed August 6, 1981, in *State of Missouri v. Anthony J. Kane*, No. WD 31,611). Both opinions are presently unreported;

State of Missouri v. Ray A. Thompson, No. 63,325, filed March 9, 1982 (the Missouri Supreme Court also adopted the opinion of the Missouri Court of Appeals, Western District, that was filed March 30, 1981, in *State of Missouri v. Ray A. Thompson*, No. WD 31,513). Both opinions are presently unreported;

State of Missouri v. Charles Arnold, No. 62,999, opinion filed March 9, 1982, and now reported as *State v. Arnold*, 628 S.W.2d 665 (Mo. 1982). Also included in the Appendix is the opinion of the Missouri Court of Appeals, Western District, that was filed March 30, 1981 in *State of Missouri v. Charles Arnold*, No. WD 31,326. Since this opinion was not expressly adopted by the Missouri Supreme Court, it is considered to be a nullity, has no precedential value and will not be officially reported in the South Western 2nd Reporter.

JURISDICTIONAL STATEMENT

In *State of Missouri v. Anthony J. Kane,* No. WD 31,611, the opinion of the Missouri Court of Appeals, Western District, was filed on August 6, 1981. The opinion affirmed respondent Kane's conviction and seven-year sentence for robbery in the second degree, § 569.030, RSMo 1978, but reversed respondent Kane's conviction and 35-year sentence for armed criminal action, § 571.015, RSMo 1978. The case was transferred to the Supreme Court of Missouri, *en banc,* which, on March 9, 1982, in the cause styled *State of Missouri v. Anthony J. Kane,* No. 63,324, affirmed the decision of the Court of Appeals on the ground that convictions and sentences for both offenses was "violative of the constitutional prohibition against double jeopardy". *State v. Kane,* No. 63,324, *supra,* at 8, slip opinion. In an unusual procedural step, the Court declared that the "original opinion of the court of appeals is approved subject to this opinion" and ordered that the opinion of the Court of Appeals would be published in the South Western 2nd Reporter "as the opinion the court of appeals to be followed in the reporter by this opinion on transfer from the court of appeals". *State v. Kane,* No. 63,324, *id.* The opinions of both courts have been reprinted in Appendix A.

In *State of Missouri v. Ray A. Thompson,* No. 31,513, the opinion of the Missouri Court of Appeals, Western District, was filed on March 30, 1981. The opinion affirmed respondent Thompson's convictions for robbery in the second degree, § 569.030, RSMo 1978, and kidnapping, § 565.110, RSMo 1978, but the case was remanded to the circuit court for the reimposition of the respondent's 15-year consecutive sentences because of a procedural irregularity. The Court of Appeals, however, vacated respondent

Thompson's conviction and 75-year sentence for armed criminal action, § 571.015, RSMo 1978, on the ground that "convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy." Slip opinion, at 14. On transfer to the Supreme Court of Missouri, *en banc*, the Supreme Court, on March 9, 1982, in the cause styled *State of Missouri v. Ray A. Thompson*, No. 63,325, affirmed the decision of the Court of Appeals for the reasons enunciated in *State v. Kane*, ... S.W.2d ....., No. 63,324 (Mo. banc March 9, 1982), and ordered the opinion of the Court of Appeals be "published as the opinion of the Court of Appeals to be followed in the reporter by this opinion on transfer from the Court of Appeals." *State v. Thompson*, No. 63,325, *supra*, at 2, slip opinion. The opinions of both courts have been reprinted in Appendix B of this petition.

In *State of Missouri v. Charles Arnold*, No. WD 31,326, the opinion of the Missouri Court of Appeals, Western District, was filed on March 30, 1981. The opinion affirmed respondent Arnold's convictions and consecutive five-year sentences for forcible rape, § 566.030, RSMo 1978, and burglary in the first degree, § 569.160, RSMo 1978, but reversed respondent Arnold's consecutive five-year sentence for armed criminal action, § 571.015, RSMo 1978. However, on March 30, 1981, the Missouri Court of Appeals ordered the case transferred to the Missouri Supreme Court pursuant to Article V, § 10, of the Constitution of Missouri, because of the general interest and importance of the case. Thereafter, on March 9, 1982, Division II of the Supreme Court of Missouri in the cause styled *State of Missouri v. Charles Arnold*, No. 62,999, issued an opinion which again affirmed respondent Arnold's convictions and consecutive five-year sentences for forcible rape and first-degree burglary, and vacated his conviction and consecutive five-year sentence for armed criminal action on the

ground "that appellant's conviction for armed criminal action constituted double jeopardy and should be reversed." *State v. Arnold*, No. 62,999, *supra*, at 3, slip opinion. The opinions of both courts have been reprinted in Appendix C of this petition, although the opinion of the Court of Appeals is a nullity and has no precedential effect, since it was not expressly adopted by the Missouri Supreme Court.

The present petition has been filed within 60 days after the entry of final judgment in all of these cases, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATUTES INVOLVED

Sections 556.041, 566.030, 569.030 and 571.015, RSMo 1978, and § 559.225, RSMo Supp. 1976, are set forth in Appendix D. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix E.

STATEMENT OF THE CASE

This joint petition involves the same issue upon which this Court recently granted certiorari in *Missouri v. Danny Hunter*, No. 81-1214 (U.S. April 5, 1982), granting certiorari in *State v. Hunter*, 622 S.W.2d 374 (Mo.App., W.D. 1981). In each of these cases, as in *Hunter*, the respondent's conviction and sentence for armed criminal action, § 571.015, RSMo 1978,[1] was vacated on the ground that convictions for both armed criminal action and the predicate felony, imposed in the same trial and arising out of the same criminal transaction, violated the Fifth Amendment's prohibition against double jeopardy.

The facts in each of these three cases, for purposes of the double jeopardy clause, are substantially the same, inasmuch as each of the respondents was prosecuted under the armed criminal action statute, § 571.015 and also was prosecuted and convicted, in the same trial, for the underlying felony. In the cases of respondents Kane and Thompson the underlying felony was robbery in the second degree, § 569.030, RSMo 1978. In the case of respondent

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1. In *Hunter*, as well as the previous cases that are or have been before this Court involving Missouri's armed criminal action statute, the defendants were convicted of armed criminal action under § 559.225, RSMo Supp. 1976, which statute was repealed and re-enacted as § 571.015, effective January 1, 1978. As re-enacted, § 571.015 is a verbatim rescript of § 559.225 with only one minor exception in Subsection (4) that is irrelevant to the issues presented by this petition.

Arnold, the underlying felony was forcible rape, § 566.030, RSMo 1978.

As previously emphasized, the issue presented by this joint petition is identical to the issue which will be considered by this Court this fall in *Missouri v. Hunter, supra,* and also is identical to the issues presented by the certiorari petitions filed by the State of Missouri in *Missouri v. Haggard,* No. 81-625 (petition for certiorari filed Sept. 24, 1981), and *Wyrick v. Williams,* No. 80-2200 (petition for certiorari filed June 29, 1981).

REASONS FOR GRANTING THE WRIT

The petitioner submits that a writ of certiorari should issue in this case because the holdings of the Missouri Supreme Court in these cases are in direct and irreconcilable conflict with recent decisions of this Court, particularly *Albernaz v. United States,* 450 U.S. ....., 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and *Whalen v. United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

In each of the three cases joined in this petition, the Missouri Supreme Court concluded that the respondent's convictions for both armed criminal action, defined by § 571.015, RSMo 1978, as the commission of a felony "by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon", and the underlying or predicate felony constituted a violation of the Fifth Amendment's prohibition against multiple punishments for the same offense. Thus, in *State v. Kane,* ..... S.W.2d ....., No. 63,324 (Mo. banc March 9, 1982), the Missouri Supreme Court expressly ruled that the State could not constitutionally "enhance or enlarge" the petitioner's punishment for the underlying felony by convicting him of armed criminal action because the multiple convictions were

"violative of the constitutional prohibition against double jeopardy". Slip opinion, at 8. Accordingly, the Court in *Kane* vacated the petitioner's conviction and 35-year sentence for armed criminal action.

Similarly, in *State v. Thompson,* ..... S.W.2d ....., No. 63,325 (Mo. banc March 9, 1982), the Missouri Supreme Court upheld the decision of the Court of Appeals, which reversed the petitioner's 75-year consecutive sentence for armed criminal action on the ground that "convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy, *State v. Thompson,* No. WD 31,513 (Mo.App., W.D. March 30, 1981), for the reason articulated by the Missouri Supreme Court in *State v. Kane, supra. State v. Thompson,* No. 63,325, *supra,* at 1, slip opinion.

Finally, in *State v. Arnold,* ..... S.W.2d ....., No. 62,999 (Mo. March 9, 1982), the Missouri Supreme Court vacated respondent Arnold's five-year consecutive sentence for armed criminal action on the ground that his "conviction for armed criminal action constituted double jeopardy". *State v. Arnold, supra,* at 3, slip opinion.

A. Nonexistence of Independent State Ground

Thus, it should be emphasized at the outset that all three of these rulings, which invalidated the respondents' convictions for armed criminal action, were based solely on double jeopardy grounds. There is, therefore, no merit to the argument that the respondent anticipates that counsel for the respondents intends to make to this Court—i.e., that the decisions of the Missouri Supreme Court in these three cases rest on an independent state ground, and do not hinge entirely on the Missouri Supreme Court's interpretation and application of the Fifth Amendment's prohibition against double jeopardy.

This argument stems from *dicta* that appears in *State ex rel. Westfall v. Ruddy*, 621 S.W.2d 42 (Mo. banc 1981), a case which specifically involved the question of whether the State could *charge* a defendant with both armed criminal action under § 571.015 and the underlying felony. The court reaffirmed its earlier rulings that convictions for both armed criminal action and the predicate felony violated the double jeopardy clause, *id.*, 621 S.W.2d at 44, and ultimately concluded that "the armed criminal action statute remains a viable part of our criminal law and is available to punish more severely those who use weapons to commit felonies". *Id.* Accordingly, the Court ruled that the State was not precluded from charging and trying the defendant for both armed criminal action and the underlying felony, but that the charges should be submitted in the alternative with directions to the jury that it could only convict of one offense. *Id.*, 621 S.W.2d at 45.

However, in the course of the opinion, the Court made reference to § 556.041, RSMo 1978, which generally precludes a conviction for more than one offense if the second "offense is included in the other", § 556.041.(1), and later stated that, although the defendant could be charged with, and tried for, both offenses, "the jury may convict of only one of them pursuant to § 556.041.(1)." *Id.*, 621 S.W.2d at 45. In a dissenting opinion written by Donnelly, J., and concurred in by Rendlen, J., Judge Donnelly referred to the above-quoted language as "dicta" and stated that he believed that the reversal of the Missouri Supreme Court's double-jeopardy rationale expressed in previous armed criminal action cases was "a certainty." He then added: "In light of such contingency, the volunteered references in the principal opinion to § 556.041, RSMo 1978, are extremely unfortunate." *Id.*, 621 S.W.2d at 46-47 (Donnelly, J., dissenting).

It would now seem that the "unfortunate" *dicta* in *Ruddy* concerning the effect of § 556.041 represents only the views of its author, Judge Bardgett, and not the majority of the court. For in the three cases joined by this petition, the *Ruddy* decision is cited by the Missouri Supreme Court only twice—in the concurring and dissenting opinions written by Bardgett, J., and Rendlen, J., respectively. This is especially significant in view of the decision of the Court of Appeals in *Kane*, which upheld the petitioner's federal constitutional claims on the theory that the issues were "controlled by State ex rel. Westfall v. Ruddy, ... S.W.2d ....., [No. 61,958] decided by the Missouri Supreme Court *en banc* July 23, 1981"; the Court of Appeals concluded that "[u]nder that decision, defendant's convictions under both counts cannot stand." *State v. Kane*, No. WD 31,611 (Mo. App., Aug. 6, 1981), at 2, slip opinion.

On transfer from the Court of Appeals, the Missouri Supreme Court recognized that there existed a legislative attempt to "enhance or enlarge" the penalty for the underlying felony, but concluded that such an attempt was "in our opinion thereby violative of the constitutional prohibition against double jeopardy". *State v. Kane*, No. 63,324, *supra*, at 8, slip opinion. No mention was made of *Ruddy* in the majority opinion and no mention was made of § 556.041.(1) anywhere in *Kane*.

It is, therefore, readily apparent, that respondent Kane's conviction and sentence for armed criminal action was vacated solely on federal double jeopardy grounds, and not on state statutory grounds, as counsel for the petitioner may be wont to suggest. As previously emphasized, the Court of Appeals in *Kane* cited *Ruddy* in responding to the petitioner's federal constitutional claims (*State v. Kane*, No. WD 31,611, *supra*, at 1-2, slip opinion), and the majority of the Missouri Supreme Court in *Kane* held only

that multiple convictions for both armed criminal action and the underlying felony were "violative of the constitutional prohibition against double jeopardy". *State v. Kane*, No. 63,324, *supra*, at 8, slip opinion.

That the respondents' armed criminal actions convictions in *Thompson* and *Arnold* were vacated by the Missouri Supreme Court exclusively because of Fifth Amendment reasons is also obvious from a reading of the opinions in those cases. In *Thompson*, the Court of Appeals treated this issue as follows:

> "The final point contends that the conviction for the Count I robbery second degree [in this case, committed by deadly weapon] and the conviction for the Count II armed criminal action violates constitutional principle. It has been decided authoritatively that convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980)."

State v. Thompson, No. WD 31,513, *supra*, at 14, slip opinion.

The Missouri Supreme Court, without mentioning either *Ruddy* or § 556.041, ruled in *Thompson* that the Court of Appeals "reached the correct result when they reversed the armed criminal action sentence. State v. Kane, ... S.W.2d ..... (Mo. banc 1982) (No. 63,324, decided March 9, 1982)". *State v. Thompson*, No. 63,325, *supra*, at 1, slip opinion.

Likewise, in the *Arnold* proceedings, the original opinion of the Court of Appeals, which subsequently was vacated when the case was transferred to the Missouri Supreme Court, concluded that the petitioner's convictions for both armed criminal action and forcible rape consti-

tuted double jeopardy. *State v. Arnold, No.* WD 31,326, *supra*, at 7, slip opinion. The Missouri Supreme Court in *Arnold* reiterated this conclusion, stating:

> "In his first and second points on appeal, appellant asserts trial court error in convincing and sentencing him for both rape and armed criminal action. In light of previous decisions of this Court, we agree with the Western District that appellant's conviction for armed criminal action constituted double jeopardy and should be reversed. *See,* State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981)."

State v. Arnold, No. 62,999, *supra,* at 3, slip opinion.

Quite simply, then all three of the respondents' armed criminal action convictions in the cases joined by this petition were reversed by the Missouri Supreme Court exclusively on the basis of the Fifth Amendment's prohibition against double jeopardy, not on any independent state statutory grounds. Consequently, even though the respondents in this case were all convicted of armed criminal action under § 571.015, rather than its predecessor statute, § 559.225 RSMo Supp. 1976, the issue in this case is otherwise in all respects identical to the issue that is presently pending before this Court in *Missouri v. Danny Hunter, supra,* No. 81-1214.

B. Invalidity of State Court's Rulings

Although the Missouri Supreme Court's rulings in each of the three cases stemmed from what the petitioner believes is clearly a misinterpretation of the Fifth Amendment's prohibition against double jeopardy, this Court will have to look to earlier decisions of the Missouri Supreme Court in order to glean the reasoning behind the state court's rulings. The latest articulation of the Missouri Su-

preme Court's reasoning for holding that convictions for both armed criminal action and the predicate felony violate the double jeopardy clause appears in *State v. Haggard*, 619 S.W.2d 44 (Mo. banc 1981). In *Haggard*, the Missouri Supreme Court ruled that, notwithstanding *Albernaz* and *Whalen*, and despite a clear legislative intent to punish for both offenses, multiple convictions for both armed criminal action *and* the underlying or predicate felony violated the Fifth Amendment's prohibition against multiple punishment for the same offense. *State v. Haggard, supra*, 619 S.W.2d at 51. A petition for certiorari is now pending before this Court as a result of that decision. *Missouri v. Haggard*, No. 81-625 (petition for certiorari filed Sept. 24, 1981).

During the oral argument of the *Haggard* case before the Missouri Supreme Court in May of 1981, counsel for the petitioner argued that any questions which might not have been definitively answered by this Court in *Brintley v. Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *United States v. DiFrancesco*, ... U.S. ....., 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), were conclusively resolved by this Court's decision in *Albernaz v. United States, supra*. Specifically, the petitioner argued that because the Missouri Supreme Court had stated in unequivocal terms that the Missouri legislature clearly intended that punishment be imposed for *both* armed criminal action and its predicate felony, *Albernaz* disposed of the double jeopardy issue, since it held that:

> ". . . The question of what punishments are constitutionally permissible is not different from what punishment the legislative branch intended to be imposed. Where Congress intended, as it did here, to im-

> pose multiple punishment, imposition of such sentences does not violate the constitution." (footnote omitted.)

Albernaz v. United States, supra, 101 S.Ct. at 1145.

However, the Missouri Supreme Court remained unconvinced or, as that court intimated, confused. The Court opined as follows:

> "Having traversed the almost identical stormy course as that of our brothers in Delaware, we too perceive ourselves sailing toward the 'Sargasso Sea' mentioned in *Albernaz* and described in *Hunter v. Delaware,* 430 A.2d 426 (Del. 1981)." (footnote omitted.)

State v. Haggard, supra, 619 S.W.2d at 49-50.

Instead of applying what the petitioner argued was the plain meaning of this Court's decision in *Albernaz*, the Missouri Supreme Court attempted to distinguish *Albernaz*:

> "Our reading of *Albernaz* persuades us that the United States Supreme Court was dealing with two separate crimes each involving proof of an element different from and not included in the other. Our case and its predecessors, *Sours I* and *Sours II,* are distinguishable from *Albernaz* for the reason that having proved every fact and element necessary to prove robbery with a dangerous and deadly weapon, you have proved every element and every fact required for proof of armed criminal action. We are in complete agreement with the *Hunter* court that 'the definitive ultimate and penultimate sentences of *Albernaz* are *dicta,* unnecessary to reach the Court's conclusion in that case; . . .' 430 A.2d at 480 (emphasis in original)."

State v. Haggard, supra, 619 S.W.2d at 50.

Having thus "distinguished" *Albernaz*, the Missouri Supreme Court subsequently went on to hold that, even though the Missouri legislature "intended to twice punish the appellant," such punishments were proscribed by the Double Jeopardy Clause of the Fifth Amendment, notwithstanding such legislative intent and notwithstanding this Court's opinion in *Albernaz*. *State v. Haggard, supra*, 619 S.W.2d at 51.

This decision provoked a sharp dissenting opinion from Judge Rendlen, who denounced what he called the majority's "adamant refusal" to follow the controlling decisions of this Court, *State v. Haggard, supra*, 619 S.W.2d at 51 (Rendlen, J., dissenting). Judge Rendlen later characterized the decision as a "cavalier evasion" of the principles enunciated in *Whalen v. United States, supra*, and *Albernaz v. United States, supra*. *State v. Haggard, supra*, 619 S.W.2d at 55 (Rendlen, J., dissenting).

Such strong language is certainly justified by the Missouri Supreme Court's stubborn refusal to follow the controlling decisions of this Court, particularly *Brintley v. Michigan, supra, Whalen* and *Albernaz*.

Throughout the course of the litigation, involving this question, the majority opinions of the Missouri Supreme Court have repeatedly ignored and refused to recognize this Court's decision in *Brintley v. Michigan, supra*. In *Brintley* this Court dismissed for want of a substantial federal question, the defendant's appeal from his multiple convictions for armed robbery and a felony firearms violation, which were affirmed by a Michigan Supreme Court in *People v. Brintley*, 406 Mich. 374, 280 N.W.2d 793 (1979). The defendant, like the respondent in the case at bar, argued that his multiple convictions for armed robbery and a felony firearms violation violated the Fifth Amend-

ment's prohibition against multiple punishments for the same offense, a claim that was summarily rejected by this Court "for want of a substantial federal question." *Brintley v. Michigan, supra*, 100 S.Ct. at 418. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves undisturbed the original judgment appealed from. *Mandel v. Bradley*, 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks v. Miranda*, 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). Although the Michigan statute (which is set out in Appendix E of this petition) differed slightly from Missouri's armed criminal action statute, the constitutional issue raised was identical, and therefore this Court's summary affirmance was binding upon the Missouri Supreme Court. *Hicks v. Miranda, supra*, 422 U.S. at 344-345. Nevertheless, the Supreme Court, in deciding *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980) (*Sours I*), while recognizing that Michigan had reached a contrary result, *id.*, 593 S.W.2d at 217, simply ignored this Court's summary affirmance of that decision.

Thus, even though this Court had held by its summary affirmance in *Brintley*, that a conviction for both a felony firearms violation such as Missouri's armed criminal action statute, § 571.015, RSMo 1978, and its predicate or underlying felony, did not violate the Fifth Amendment's prohibition against multiple punishments for the same offense, the Missouri Supreme Court in *Sours I* reached a decision to the contrary. *Sours v. State, supra*, 593 S.W.2d at 222-223.

This decision was, of course, set aside by this Court on May 27, 1980, for reconsideration in light of *Whalen v. United States, supra, Missouri v. Sours*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). In *Whalen* this Court concluded that multiple punishments could be imposed for

the same offense "without running afoul of the double jeopardy guarantee of the Constitution" where specifically authorized by statute, *Whalen v. United States, supra,* 100 S.Ct. 1436, and further stated that the rule enunciated in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), was simply "a rule of statutory construction." *Id.,* 100 S.Ct. at 1438. Accordingly, this Court held in *Whalen* that "where the offenses are the same under [the *Blockburger*] test, cumulative sentences are not permitted, *unless elsewhere specifically authorized by Congress.*" *Id.,* 100 S.Ct. at 1439. (emphasis added.)

Despite this language, the Missouri Supreme Court on remand reiterated its original conclusion that *Blockburger* was not a rule of statutory construction but rather was a rule of substantive constitutional law. *Sours v. State,* 603 S.W.2d 592, 605-606 (Mo. banc 1980). The Missouri Supreme Court stated that it was unwilling to "collapse the constitutional question into the question of legislative intent", *Sours v. State, supra,* 603 S.W.2d at 595, n. 3, and subsequently reaffirmed its original opinion in *Sours I.*

On January 26, 1981, the State of Missouri's petition for writ of certiorari was denied. *Missouri v. Sours,* ..... U.S. ....., 101 S.Ct. 953, 67 L.Ed.2d 118 (1981). The order of denial indicated that two of the justices, Justice Blackmun and Justice Rehnquist, "would dismiss the petition for writ of certiorari as moot." *Id.,* 101 S.Ct. at 593. The possible mootness resulted from the fact that, prior to the disposition of the petition by this Court, Sours completed serving his sentence for both the armed criminal action charge *and* the underlying robbery. See Res.Br. in Opp. to Cert., in *State v. William Scott Sours,* No. 80-571, at 6.

Although it is reasonably certain that this Court's reluctance to entertain the State of Missouri's second pe-

tition in *Sours* stemmed from the fact that the case was, in all but a legal sense, moot, the Missouri Supreme Court in *State v. Haggard, supra,* purported to treat this Court's denial of the second petition in *Sours* as approval of the position taken by that Court in *Sours II*. *State v. Haggard, supra,* 619 S.W.2d at 51. However, in view of this Court's opinion in *Albernaz* and its treatment of subsequent petitions for writs of certiorari filed by the State of Missouri, challenging the reversal of armed criminal action convictions in reliance on *Sours II,* it is clear that such an interpretation is indefensible.

In *Albernaz v. United States, supra,* this Court finally cleared up much of the confusion surrounding the scope of the Double Jeopardy Clause insofar as it protects against multiple punishments for the "same offense". In *Albernaz,* the defendants were convicted, in a single proceeding, of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences on each count. Both convictions stemmed from a single agreement, the objectives of which were to import marijuana and then to distribute it domestically. The defendants argued that Congress had not intended multiple punishments to be imposed in a situation such as theirs and that, even if it had such an intent, the Double Jeopardy Clause of the Fifth Amendment prohibited the imposition of such punishment.

In rejecting both arguments, this Court emphasized, just as it previously had done in *Whalen v. United States, supra,* 100 S.Ct. at 1438, that the *Blockburger* test, which was treated as a matter of substantive constitutional law in *Sours I* and *II,* was actually nothing more than " 'a rule of statutory construction' ", which, "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication

of contrary legislative intent." *Albernaz v. United States, supra,* 101 S.Ct. at 1143. The court then held that the defendants' convictions for conspiracy to import marijuana and conspiracy to distribute marijuana were not the "same offense" under *Blockburger* because each offense required proof of an element that the other did not, *and* because the court could find no evidence of a legislative intent "contrary to the presumption which should be accorded to th[o]se statutes after application of the *Blockburger* test." *Albernaz v. United States, supra,* 101 S.Ct. 1137.

Having found, therefore, congressional intent to punish for both offenses, this Court then turned to the defenant's double jeopardy argument. The defendant contended that, notwithstanding the existence of legislative intent to punish for both offenses, the multiple punishments they received violated the Double Jeopardy Clause of the Fifth Amendment. Although this Court reaffirmed its previous rulings that the Double Jeopardy Clause protects against *inter alia,* " 'multiple punishments for the same offense' ", *Albernaz v. United States, supra,* 101 S.Ct. at 1145, this Court rejected the defendants' double jeopardy argument in the following language:

> "Last Term in *Whalen v. United States,* this Court stated that 'the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishment the Legislative Branch has authorized.' 445 U.S., at 688; *id.,* at 696 (White, J., concurring in part and concurring in the judgment); *id.,* at 696 (Blackmun, J., concurring in the judgment). In determining the permissibility of the imposition of cumulative punishment for the crime of rape and the crime of unintentional

killing in the course of rape, the Court recognized that the 'dispositive question' was whether Congress intended to authorize separate punishments for the two crimes. *Id.*, at 689. This is so because the 'power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' *Ibid.* As we previously noted in *Brown v. Ohio, supra,* 'where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishment for the same offense.' 432 U.S., at 165. Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." (footnote omitted.) *Albernaz v. United States, supra,* 101 S.Ct. at 1145.

In a concurring opinion written by Justice Stewart, in which Justice Marshall and Stevens joined, Justice Stewart took issue with the majority's conclusion that Congress (or, presumably, a state legislature) could constitutionally provide for cumulative punishments even where the two crimes were the "same offense" under the *Blockburger* test. *Albernaz v. United States, supra,* 101 S.Ct. at 1145-1146 (Stewart, J., concurring). These three justices specifically objected to the court's statement that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed",[2] and the

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2. This statement of law appears to have been borrowed verbatim from Justice Blackmun's concurring opinion in *Whalen*

(Continued on following page)

following sentence which stated that "[w]here Congress intended as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution." *Id.*, 101 S.Ct. at 1145. These three concurring justices stated that "[t]hese statements are supported by neither precedent nor reasoning and are unnecessary to reach the Court's conclusion." *Id.*, 101 S.Ct. at 1145. The three concurring justices then added:

> "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required a proof of a fact that the other did not, under the criteria of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306." *Id.*, 101 S.Ct. at 1145-1146.

Consequently, the express language of the majority opinion, together with the vigorous objections of Justice Stewart and the two other concurring justices, leave no room for quibble: where, as here, the legislature has expressly authorized multiple punishments for both armed criminal action and the underlying felony, multiple punishments for both offenses are permissible under *Albernaz*, even if the two crimes would normally be considered the "same offense" under *Blockburger* for double jeopardy purposes.

As previously emphasized, *Sours I* and *II* were bottomed on the premise that the *Blockburger* test was a

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Footnote continued—

v. United States, supra, where he urged this Court to expressly hold that "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Id.*, 100 S.Ct. at 1432. Justice Blackmun reiterated this conclusion in his concurring opinion in *Busic v. United States*, 446 U.S. 398, 100 S.Ct. 1747, 1756, 64 L.Ed.2d 381 (1980) (Blackmun, J., concurring).

rule of substantive constitutional law and that if two offenses were the "same" under *Blockburger*, multiple punishments were prohibited by the Fifth Amendment. However, *Albernaz* expressly rejected that reasoning, holding that the *Blockburger* test is a " 'rule of statutory construction' " and that "because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Id.*, 101 S.Ct. at 1143.

The Missouri Supreme Court has, of course, repeatedly recognized that the Missouri legislature clearly intended that multiple punishments be imposed for both armed criminal action and the underlying or predicate felony. *Sours v. State, supra,* 593 S.W.2d at 216; *Sours v. State, supra,* 603 S.W.2d at 598-599; *State v. Haggard, supra,* 619 S.W.2d at 51; *State v. Kane,* No. 63,324, *supra,* at 8, slip opinion. Such a conclusion is inescapable in view of the express language of the second sentence of § 571.015, RSMo 1978, which provides that the "punishment imposed pursuant to the subsection *shall be in addition to* and any punishment provided by law for the crime committed by, with, or through the use, assistance or aid of a dangerous or deadly weapon." (emphasis added.) Consequently, even if armed criminal action and the underlying felony would normally be presumed to be "the same offense" under the *Blockburger* test, this presumption would "not be controlling" here, since, as § 571.015 expressly states, and as the Missouri Supreme Court has repeatedly acknowledged, "there is a clear indication of contrary legislative intent." *Albernaz v. United States, supra,* 101 S.Ct. at 1143.

As previously noted, the Missouri Supreme Court in *Haggard* dismissed the controlling language of this Court's decision in *Albernaz* as " '*dicta*' ". *State v. Hag-*

gard, supra, 619 S.W.2d at 50. As a result, the Missouri Supreme Court in *Haggard* concluded that the reversal of its prior position was not mandated by *Albernaz.* The court then adhered to its original holding in *Sours I* and *Sours II* and concluded that multiple punishments for both armed criminal action and the underlying offense, arising out of the same transaction, violated the Fifth Amendment's prohibition against multiple punishment for the same offense. *State v. Haggard, supra,* 619 S.W.2d at 51. It is, therefore, readily understandable why Judge Rendlen characterized this conclusion as "the majority's adamant refusal to follow the controlling law, most recently announced" by this Court in *Albernaz. State v. Haggard, supra,* 619 S.W.2d at 51 (Rendlen, J. dissenting). Indeed, the Missouri Supreme Court's ruling in *Haggard* not only ignored the holding in *Albernaz* (by characterizing it as "'*dicta*'") but also failed to consider this Court's actions on March 23, 1981, the date this Court issued its rulings in *Albernaz, Missouri v. Counselman,* ..... U.S. ....., 101 S.Ct. 1690, 68 L.Ed.2d 190 (1981), *Delaware v. Hunter,* ..... U.S. ....., 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981), *Delaware v. Evans,* ..... U.S. ....., 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981), and *Whack v. Maryland,* ..... U.S. ....., 101 S.Ct. 1688, 68 L.Ed.2d 189 (1981).

In *Missouri v. Counselman, supra,* this Court, in a 6-to-3 decision, vacated opinions of the Missouri Court of Appeals which had relied on *Sours I* and *II* to reverse armed criminal action convictions, and remanded the cases to the Eastern District of the Court of Appeals "for further consideration in light of *Albernaz v. United States,* 450 U.S. ....., 1981." *Id.,* 101 S.Ct. at 1690. Obviously, if the majority of this Court in *Albernaz* had considered the dispositive language of *Albernaz* mere *dicta* which was not binding on the Missouri Supreme Court, these remands would have made little or no sense. Furthermore,

it is significant that the three justices who concurred in *Albernaz*—Justice Stewart, Marshall and Stevens—dissented in *Counselman*.[3]

Equally revealing is the fact that, on the same day that the opinions in *Counselman* were vacated, this Court also reversed two Delaware cases where the Delaware Supreme Court, under virtually identical circumstances, had held that multiple convictions and punishments for both armed robbery and a felony firearms offense, stemming from the same transaction, constituted double jeopardy. *Delaware v. Hunter, supra,* 101 S.Ct. at 1689; *Delaware v. Evans, supra,* 101 S.Ct. at 1689. Justices Stewart, Marshall and Stevens again dissented in both cases. This Court also dismissed on March 23rd an appeal for want of jurisdiction or, in the alternative, denied certiorari, in a case from Maryland where the state court had held that multiple convictions and sentences for both armed robbery and a felony firearms offense had not constituted double jeopardy. *Whack v. Maryland, supra,* 101 S.Ct. at 1688. Again, Justices Stewart, Marshall and Stevens disagreed with the action of the majority; they would have "note[d] probable jurisdiction and [would have] set the case for oral argument." The effect of these rulings, issued on the same day and by the same 6-to-3 configura-

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3. Subsequent to its order in *Counselman*, this Court issued five identical rulings in the other joint petitions for a writ of certiorari filed by the State of Missouri to contest the Missouri Supreme Court's double jeopardy holdings in armed criminal action cases. *Missouri v. Brown,* ..... U.S. ....., 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *Missouri v. Greer,* ..... U.S. ....., 101 S.Ct. 3000, 69 L.Ed.2d 385 (1981); *Missouri v. Sinclair,* ..... U.S. ....., 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri v. Lowery,* ..... U.S. ....., 101 S.Ct. 3044, 69 L.Ed.2d 415 (1981); *Missouri v. Crews,* ..... U.S. ....., 101 S.Ct. 3103, 69 L.Ed.2d 968 (1981). In response to those orders of remand, the Missouri Supreme Court issued its decision in *Haggard* and reaffirmed its position that convictions for both armed criminal action and the underlying felony constitute multiple punishment for the same offense.

tion of justices that was present in *Albernaz*, resulted in the vacation, on the basis of *Albernaz*, of those state court opinions which had reversed convictions for armed criminal action or felony firearms offenses on double jeopardy grounds, but left standing the lone decision (*Whack*), that had reached a contrary result, *i.e.*, holding that multiple convictions for both a felony firearms offense and the predicate felony did not constitute double jeopardy.

The significance of this action certainly was not lost on the Delaware Supreme Court. On May 12, 1981, the Delaware Court responded by recognizing the clear import of *Albernaz* and concluded that multiple punishments for both a felony firearms offense and the predicate felony imposed at a single criminal trial "does not violate the Double Jeopardy Clause of the Fifth Amendment." *Hunter v. State*, 430 A.2d 476, 481 (Del. 1981). See also, *Evans v. State*, 430 A.2d 481 (Del. 1981). While recognizing the alleged "frustration" of the Delaware Supreme Court in *Hunter*, the Missouri Supreme Court in *Haggard* refused to recognize the propriety of *Hunter's* ultimate conclusion. *State v. Haggard, supra*, 619 S.W.2d at 50. Consequently, the Missouri Supreme Court remains the final holdout. Of the four states—Michigan, Maryland, Delaware and Missouri—which have litigated this issue before this Court in the last two years, only Missouri continues to hold—contrary to *Brintley*, *Whalen* and *Albernaz*—that multiple convictions for both a firearm felony offense, such as Missouri's armed criminal action statute, and the predicate felony, violate the Fifth Amendment of the United States Constitution.

In other words, as a result of this Court's dismissal of the defendant's appeal for want of a substantial federal question in *Brintley*, the Fifth Amendment is no bar to a defendant's multiple convictions, in the same proceeding,

for both a felony firearms offense and the predicate felony in Michigan.

As a result of this Court's action in *Whack v. Maryland, supra,* and the Maryland Court's opinion in *Whack v. State,* 288 Md. 137, 416 A.2d 265 (Md. App. 1980), a defendant in Maryland also may be similarly convicted of both a felony firearms offense and the underlying felony.

As a result of this Court's decisions in *Delaware v. Hunter, supra,* and *Delaware v. Evans, supra,* and the Delaware Supreme Court's subsequent opinions in *Hunter v. State, supra,* and *Evans v. State, supra,* a defendant in Delaware may be convicted for both a felony firearms offense and the predicate felony.

However, as a result of the Missouri Supreme Court's intransigence and its inexplicable refusal to follow this Court's ruling in *Albernaz,* Missouri stands alone in holding that multiple convictions for both armed criminal action and the underlying felony violates the Fifth Amendment.

The respondent submits that the holding of the Missouri Supreme Court in these cases (including the three cases joined by this petition) is contrary to *Albernaz, Whalen* and every other case recently decided by this Court which interprets the Fifth Amendment's prohibition against multiple punishments for the same offense. As previously emphasized, this Court has recently granted certiorari in *Missouri v. Hunter, supra,* where the identical issue has been raised. This Court's ultimate decision in *Hunter* will control this case as well, since the only difference in the two cases is that the respondent in *Hunter* was convicted of armed criminal action under § 559.225, RSMo Supp. 1976, and the respondents in the instant case were convicted under § 571.015, RSMo 1978, and the two statutes are, in all pertinent respects, identical.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PHILIP M. KOPPE, *Counsel of Record*
Assistant Attorney General
Missouri State Office Building
615 E. 13th Street, Room G-20
Kansas City, Missouri 64106
(816) 274-6773
Attorneys for Petitioner

STEVEN W. GARRETT
Assistant Attorney General
Supreme Court Building
P. O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Of Counsel